COMMITTEE ON EDUCATION
AND LABOR
U.S. HOUSE OF REPRESENTATIVES
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SUBMITTED VIA REGULATIONS.GOV

The Honorable John F. Ring
Chairman
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Re: RIN 3142-AA16: Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships

Dear Chairman Ring:

We write in support of the National Labor Relations Board's (NLRB or Board) August 12, 2019, Notice of Proposed Rulemaking updating representation-case procedures.[1] The proposed rule amends the Board's rules governing the filing and processing of petitions for a Board-conducted representation election while unfair labor practice charges are pending and following an employer's voluntary recognition of a union as the majority-supported collective-bargaining representative of the employer's employees. The proposed rule also amends the evidence required to prove that an employer and labor organization in the construction industry have established a voluntary majority-supported collective-bargaining relationship.

Since the enactment of the *Labor-Management Relations Act* amending the *National Labor Relations Act* (NLRA) over 70 years ago, federal labor law has struck a careful balance between

[1] Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 84 Fed. Reg. 39,930 (Aug. 12, 2019).

the right of employees to organize and bargain collectively with an employer and the rights of the employer throughout the organizing and bargaining process. However, one area in which labor law needs updating is the right of employees within unions. The NLRA as currently written does not clearly or sufficiently protect the right of employees to a secret ballot for union elections, to refrain from being forced to fund union activity, or to decertify a union, among other necessary worker protections. However, the NLRB can and should interpret the law in a manner that protects some of these important rights where the statute permits such an interpretation. This proposed rule is an example of exactly that, and we urge the Board to adopt it.

Republicans on the Committee on Education and Labor (Committee) have long advocated to amend the NLRA to strengthen employee rights and are continuing to pursue this effort. On September 25, 2019, Committee Republicans offered a number of important amendments at the markup of H.R. 2474, the *Protecting the Right to Organize Act*, to require employers to receive consent from a worker before sharing his or her personal information with a union, to require union certification elections to be conducted by secret ballot, and to require unions to stand for periodic recertification election, among others.[2] Unfortunately, these amendments were defeated on party-line votes. While Congress appears unable to effectively modernize the NLRA, the NLRB's proposed rulemaking is even more important to protect workers' rights within unions.

Too many workers today are stuck paying hundreds of dollars a year to a union with which they do not wish to associate. Twenty-three states lack right-to-work laws, meaning that workers in these states can be fired for refusing to pay certain fees to the union in their workplace. Moreover, nationwide as of 2015, over 90 percent of workers covered by a union under the NLRA have never voted for that union to represent them.[3] Because unions are not required to stand for automatic recertification elections, the vast majority of workers simply inherited a union that was voted into their workplace years or even decades ago and have never been given the chance to express their opinion of the union in an election. For example, the United Auto Workers (UAW) union organized Michigan's so-called "Big Three" automakers more than 70 years ago. Today the UAW represents nearly 150,000 workers between these three companies, yet none of these workers has ever voted for the UAW. Nevertheless, these employees are required to accept UAW representation, and, prior to the enactment of Michigan's right-to-work law in 2013, autoworkers there were forced to pay hundreds of dollars a year to the UAW as a condition of employment.

Limiting Blocking Charges

Currently, the only way workers represented by a union can vote to retain or remove their union is to petition for a decertification election. However, because of various non-statutory "bars" imposed by the NLRB, the opportunity to do so has been narrowed to a short window of time toward the end of a collective bargaining agreement, which often lasts as long as three or four years. When employees successfully petition the Board for a decertification election in the appropriate window of time, it is important that this election take place in a timely manner and not be delayed or prevented altogether by unions seeking to retain control over the flow of dues.

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[2] *Markup of H.R. 2474, Protecting the Right to Organize Act of 2019*, 116th Cong. (2019).

[3] JAMES SHERK, HERITAGE FOUND., UNELECTED REPRESENTATIVES: 94 PERCENT OF UNION MEMBERS NEVER VOTED FOR A UNION (Aug. 30, 2016).

The first portion of this proposed rule addresses the primary method by which unions stave off decertification elections. Currently, when a union files an unfair labor practice charge against an employer during a decertification effort, the decertification election is delayed until the charge is resolved. Functionally, these charges can delay decertification elections from taking place for years, or even indefinitely. The NLRB's Casehandling Manual explicitly states that blocking charges are "not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition," yet that is exactly how unions deploy them.[4]

Ironically, the NLRB's 2014 election rule sought to complete union certification elections more quickly—unfair labor practice charges notwithstanding—but the Board under President Obama was interested in ensuring that elections take place expeditiously only when employees are seeking to certify a union, not when they are seeking to decertify a union already in their workplace.[5] It is simply unacceptable and undemocratic to force employees to wait years for the chance to exercise their legally protected right to determine their own representation, as is currently the case for union decertification elections.

The proposed rule's "vote-and-impound" procedure would prevent unions from filing frivolous charges against an employer to block elections from taking place, while ensuring that charges are properly examined and elections take place under "laboratory conditions," as the Board requires.[6] It is unnecessary to make employees wait to vote while the Board assesses the validity of charges. Rather, as the proposed rule allows, workers should be free to vote with the ballots impounded until the Board resolves the charges. By doing so, the Board would allow elections to move forward expeditiously; if the charges are frivolous, then the election result would stand. Under the proposed rule, workers would be able to exercise their rights more quickly. However, if the union's charge against the employer is upheld and the election result is voided, then the Board maintains the existing process to remedy wrongdoing and ensures laboratory conditions for a re-vote. Ultimately, the proposed rule reforming election procedures in the event of unfair labor practice charges does not undermine in any way unions' or workers' right to justice. Rather, it ensures that frivolous union blocking charges do not delay justice.

Limiting the Recognition Bar

The proposed rule contains a second important reform to ensure protection of workers' voting rights. In its 2007 *Dana Corp.* decision, the Board mandated that employees have 45 days to file an election petition following an employer's voluntary recognition of a union.[7] However, in 2011, the NLRB under President Obama overturned this decision in the *Lamons Gasket Co.* case, eliminating the opportunity for workers to file an election petition following voluntary recognition.[8] The status quo under the *Lamons Gasket Co.* decision creates a situation in which workers are prevented from voicing their opinion on union representation in a secret-ballot election. The proposed rule would ensure they can do so.

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[4] NLRB CASEHANDLING MANUAL, pt. 1, UNFAIR LABOR PRACTICE PROCEEDINGS § 11730 Blocking Charge Policy—Generally (June 2019).
[5] 29 C.F.R. pts. 101-103.
[6] General Shoe Corp., 77 NLRB 124, 127 (1948).
[7] 351 NLRB 434 (2007), overruled by Lamons Gasket Co., 357 NLRB 739 (2011).
[8] Lamons Gasket Co., 357 NLRB 739 (2011).

Currently, a union can organize a workplace by collecting authorization cards from more than half of the bargaining unit, at which point the employer may voluntarily recognize the union, but union officials often present these authorization cards to workers in public or in other coercive settings in which they are pressured into signing. Over the past decade, the Committee has heard testimony from several employees who have been personally subjected to this kind of union harassment. For example, in 2011, Mr. Larry Getts, an employee at Dana Corporation in Fort Wayne, Indiana, testified that union officials would "even follow us to our vehicles at the end of the day and some of us even to our homes."[9] In June 2013, Ms. Marlene Felter, a medical records coder in California, testified that union organizers "were calling them on their cell phones, coming to their homes, stalking them, harassing them … to convince them to sign union cards."[10]

The U.S. Supreme Court has acknowledged that the so-called card-check process is "admittedly inferior to the election process" for determining representation.[11] Voluntary recognition based on a showing of support through union authorization cards is simply not a reliable indicator that the union has earned support from more than half of the bargaining unit. While it is important that an employer bargain in good faith with a majority-supported union, it is essential that the Board ensure the union has properly demonstrated such majority support. The proposed rule would do so by re-imposing the *Dana Corp.* decision's 45-day window following voluntary recognition for employees to file an election petition, an important opportunity for workers to demonstrate in a secret-ballot election whether they wish to be represented by the union the employer has recognized.

Limiting the Contract Bar in Construction

Finally, unique to the construction industry, the Board has held that an employer and union can demonstrate majority support of the union based on contract language alone, without any other evidence of a contemporaneous showing of majority support.[12] While Congress enacted special provisions for labor law governing construction because of characteristics unique to the industry, the status quo deprives free choice by subjecting employees to the "contract bar" that precludes petitions until after the execution of the initial contract, which can deprive workers of their rights to vote on union recognition for as long as three years. In the interest of avoiding conflict and facilitating collective bargaining between a union and construction-industry employer, the Board has undermined the rights of employees within their union under the NLRA. The proposed rule would remedy this problem and protect employee free choice by requiring clear evidence that employees have affirmatively chosen the union to act as their exclusive bargaining representative.

Conclusion

Federal labor law must balance the interests of employers, unions, and workers. The NLRB's rules and regulations are an important part of ensuring this balance. Under President Obama, the Board upended dozens of case-law precedents, which increased the power of labor unions at the

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[9] H. Rept. 113-583, at 7 (2014).
[10] *Id.* at 6.
[11] NLRB v. Gissel Packing Co., 395 U.S. 575, 603 (1969).
[12] Staunton Fuel & Material, Inc., 335 NLRB 717 (2001).

expense of employee rights.[13] The proposed rule would help restore important and needed balance to the NLRA by expanding employee free choice. We urge the Board to adopt the proposed rule expeditiously.

Respectfully submitted,

Rep. Virginia Foxx
Ranking Member

Rep. Tim Walberg
Ranking Member
Subcommittee on Health, Employment, Labor, and Pensions

[13] MICHAEL J. LOTITO ET AL., COAL. FOR A DEMOCRATIC WORKPLACE & LITTLER MENDELSON WORKPLACE POL'Y INST., WAS THE OBAMA NLRB THE MOST PARTISAN IN HISTORY? (Dec. 6, 2016).